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The Truth Will Not Set You Free in Nebraska: Actual Malice and Nebraska's "Truth Plus Motive" Defense

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Comment

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TABLE OF CONTENTS

I. INTRODUCTION

Almost every journalist will tell you that a reporter or publisher will be protected if what he writes, prints or broadcasts is true. However, truth is not the absolute talisman to defamation actions that it is widely believed to be. A majority of states accept truth as a complete defense to civil defamation actions; however, a few states require a

defendant in a defamation action to prove more than the truth in order to be protected from liability.[1] Nebraska is such a state, requiring a defamation defendant to show not only the truth of the allegedly defamatory statement but also that he published the stories with good motives and for justifiable ends—a "truth plus motive" defense.[2]

This "truth plus motive" requirement can be found in the Nebraska Constitution. Article I, § 5 of Nebraska's Bill of Rights provides, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."[3] A similar limitation on truth as a defense is also codified in Nebraska statutes. Nebraska statute § 25-840 provides, "In the actions mentioned in Section 25-839 [libel and slander], the defendant may allege the truth of the matter charged as defamatory. . . . The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice."[4] Nebraska courts have adopted the common law definition of malice, "hate, spite or ill will,"[5] and the unconstitutionality of Nebraska's defense to libel hinges on this definition of actual malice. The Nebraska Supreme Court's historical application of § 25-840 and its specific interpretation of actual malice as common law malice have created a total bar to the "truth alone" defense and established the good motives requirement as an element of the truth defense in defamation actions. Consequently, in Nebraska, true statements are protected from a defamation action only if the publisher wrote or spoke without ill will, hate or spite.

This "truth plus motive" standard appears decent and noble. It

1. Those states in addition to Nebraska that have a statutes or constitutional provisions codifying the "truth plus motive" defense are: Delaware, DEL. CODE ANN., tit. 10, § 3919 (West 1990); Florida, FLA. CONST. art. 1, § 4 (1991); Illinois, ILL. CONST. art. I, § 4 (1993); Massachusetts, MASS. GEN. LAWS ANN. Ch. 231, § 92 (1985); Nevada, NEV. CONST. art. 1, § 9 (1991); North Dakota, N.D. CONST. art. I, § 4 (1981); Pennsylvania, 42 PA. CONS. STAT. ANN. § 8342 (1982) and Pa. Const. art. 1, § 7 (1990); Rhode Island, R.I. GEN. LAWS § 9-6-9 (1990); South Dakota, S.D. CONST. art. VI, § 5 (1991); West Virginia, W. VA. CONST. art. III, § 8 (1989); Wyoming, WYO. CONST. art. I, § 20 (1990). In addition to those states discussed *infra* at notes 170-178, West Virginia and Wyoming courts have recently held the "truth plus motive" defense to be unconstitutional in light of *New York Times Co. v. Sullivan*. *See* Dixon v. Ogden Newspapers, Inc., 416 S.E.2d 237 (W.Va. 1992), *cert. denied*, — U.S. —, 113 S. Ct. 325, 122 L.Ed.2d 245 (1992); Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992).
2. The labelling of Nebraska's interpretation of the truth defense as "truth-plus-motive" is found in Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790 (1964).
3. NEB. CONST. art. I, § 5.
4. NEB. REV. STAT. § 25-840 (Cum. Supp. 1992).
5. Turner v. Welliver, 226 Neb. 275, 290, 411 N.W.2d 298, 309 (1987).

also appears morally and intellectually satisfying in that a person's reputation should not be harmed, even by the truth, if the speaker is not motivated by honorable causes.[6] The Supreme Court, however, has not adopted this rationale. Rather,it has specifically declared the "truth plus motive" standard unconstitutional and "overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."[7]

This comment will present the relevant federal and Nebraska case law regarding the truth defense, demonstrating that Nebraska's current interpretation of the "truth plus good motives" defense to libel actions is unconstitutional. Specifically, this comment will examine the Nebraska court's definition of "actual malice" as it relates to public officials and demonstrate that this definition causes § 25-840 to be unconstitutional.

II. *NEW YORK TIMES COMPANY v. SULLIVAN* AND ITS PROGENY—THEIR EFFECT ON THE "TRUTH PLUS MOTIVE" DEFENSE

A. Common Law Defamation Prior to *New York Times*

Prior to the significant changes in the law of defamation worked by the United States Supreme Court beginning in 1964[8], the media's ability to comment or report on public figures was substantially limited to true statements of fact and limited expressions of opinion.[9] Five elements were generally necessary to establish libel at common law:

1) Defamatory words, either fact or opinion, relating to the plaintiff;
2) Falsity of fact or lack of factual justification for opinion;
3) Publication to third parties;
4) Malice, i.e., ill will or hostility, actual or implied; and
5) Injury.[10]

Under the above formulation, the publisher of the statement was liable for deliberate lies, negligent falsehoods, and, in a minority of states, true statements made with ill-will. The plaintiff had to prove

6. Garrison v. Louisiana, 379 U.S. 64, 72-73 (1964); Wertz v. Sprecher, 82 Neb. 834, 838, 118 NW 1071, 1072 (1908); Franklin, *supra* note 2 at 806-07.
7. Garrison v. Louisiana, 379 U.S. 64, 73 (1964).
8. 1964 is significant because the Supreme Court began its re-ordering of defamation laws with *New York Times Co. v. Sullivan* in that year. *See infra* text accompanying notes 17-29.
9. *See* FOWLER V. HARPER, ET AL., 2 THE LAW OF TORTS 5.0 (2d ed. 1986).
10. John B. McRory & Robert C. Bernius, *Constitutional Privilege in Libel Law, in* PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES NUMBER 346, COMMUNICATIONS LAW 1991 89, 95-96 (1991).

that the defendant published[11] the statement and that the statement was defamatory. The defendant was held liable unless he could prove the truth of the statement or that the statement was made on a privileged occasion.[12]

At common law a successful defense of truth required the publisher to prove the truth of the entire statement; consequently, the defendant was strictly liable for any statement he made. Proof that the statement was only partially true was not sufficient to support the defense.[13] If the statement was false the defendant was liable. The defendant's state of mind regarding the truth or falsity of the statement was irrelevant, no matter how honest or reasonable the defendant's belief in the truth of an ultimately false statement.[14] Truth was an absolute defense to a libelous statement in many states; however, in a minority of jurisdictions, the plaintiff was allowed to overcome the truth defense by a showing that the defendant published the statement with actual malice *i.e.* spite, hostility or ill-will.

For nearly the first two centuries of our history, the creation and interpretation of defamation law was left to the states. Each state developed varying standards of proof of defamation, paying little heed to the effect the law had on the news media or free speech. In this tangle, the "truth plus motive" defense became accepted by a number of states.[15] In 1964, the United States Supreme Court first entered the morass of state libel law in an effort to impose a national standard of proof in the defamation arena. Their first move in this effort began with the landmark case, *New York Times Company v. Sullivan*.[16] As the genesis of constitutional malice, the *New York Times* decision must be considered in an assessment of the "truth plus motive" defense.

B. *New York Times Company v. Sullivan*—Constitutional Malice Established

The *New York Times* case arose in the turbulent and politically heated civil rights struggle of the early 1960's. On March 29, 1960, a full page advertisement, critical of the Alabama and Montgomery governments' actions in various civil rights demonstrations, ran in the New York Times. The advertisement was endorsed by over sixty

11. "Published" not only refers to physical publication in the print media but also oral dissemination. BLACK'S LAW DICTIONARY 855 (6th ed. 1991).
12. Common law privileges are of two types—conditional and absolute. The absolute privileges are: 1) judicial proceedings, 2) legislative, administrative, and executive proceedings, 3) publication of reports of public proceedings and meetings. HARPER, ET AL., *supra* note 9, §§ 5.21-.27 at 177-231.
13. *Id.* at § 5.20 at 166-67.
14. *Id.*
15. *See supra* note 1.
16. 376 U.S. 254 (1964).

prominent performers, politicians, and religious figures.[17] L.B. Sullivan, one of three elected city commissioners in Montgomery, sued the *New York Times* for libel, alleging that, as commissioner of public affairs whose duties included the supervision of the police department, he had been injured by the advertisement. Sullivan was not specifically named anywhere in the advertisement and a reader would be hard pressed to see how the advertisement referred to him.[18] Sullivan also named as defendants four local, black ministers whose names had been included in the advertisement without their knowledge.

The trial lasted three days in a strongly racially prejudiced courtroom.[19] After only two hours of deliberation, the jury returned a verdict of $500,000 against the New York Times and the four ministers.[20] The Alabama Supreme Court sustained the trial court in all rulings, after which the defendants appealed to the Supreme Court.[21]

Justice William Brennan authored the opinion of the Court in *New York Times*,[22] focusing on the need to fashion liability rules which did not inhibit the free exercise of public criticism. Brennan noted that under the traditional common law rules, a speaker was required to guarantee the truth of all his factual statements.[23] The penalty under common law for even an unintentional false statements was virtually unlimited libel judgements, a result which ultimately led to self-censorship.[24] Such a result was unacceptable given the compelling need for an unfettered and vocal news media in the structure of our government. Justice Brennan also reasoned that the defense of truth, with the burden of proof placed on the defendant, not only deters false

17. Among those signing the advertisement were Marlon Brando, Nat "King" Cole, Sammy Davis, Jr., Mahalia Jackson, Sydney Portier, Jackie Robinson, Eleanor Roosevelt, Maureen Stapleton, and Shelly Winters. RICHARD LABUNSKI, LIBEL AND THE FIRST AMENDMENT—LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING, 105 n. 3 (1987).

18. Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339, 344 (1990). Hall's article offers an excellent account of the social and political forces that motivated the *New York Times* decision. *See also* ANTHONY LEWIS, MAKE NO LAW—THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

19. The four ministers used the tainted atmosphere as a basis for their appeal to the Supreme Court. *Id.* at 354.

20. CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS—THE EVOLVING LAW OF LIBEL 216 (1971). This was the largest judgement, defamation or otherwise, in Alabama history. Hall, *supra* note 18, at 355. The trial judge rejected the defendants' motions for new trial based on the excessive amount of the judgement. Furthermore, the Alabama Supreme Court denied any appeals.

21. Labunski, *supra* note 17 at 74. This was the first time the Supreme Court granted certiorari to a state libel judgement. Lawhorne, *supra* note 20 at 216.

22. Justices Black and Goldberg issued concurring opinions which Justice Douglas joined. New York Times Co. v. Sullivan, 376 U.S. 254, 293-305 (1964).

23. *See supra* text following notes 8-15.

24. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

speech but also truthful speech. It was often difficult to produce absolute proof that a statement was true in all its factual particulars.[25] Consequently,

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."[26]

Therefore, the common law defamation standards caused an unnecessary and dangerous timidity in the press that, "dampens the vigor and limits the variety of public debate."[27] Recognizing the inevitable nature of inadvertent falsehoods and unintentional missteps, the Court set out to remove the chill caused by common law defamation.

In doing this the Court in essence, found the defense of truth alone to be inadequate to protect speech and promote public debate. As a result, the Supreme Court developed a new standard of proof for publications concerning the official conduct of a public official which did not rely on the absolute truth of the statement as a defense. The Court stated,

> the constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[28]

In this one sentence the Court worked a revolution in common law defamation. In a single stroke they removed the strict liability of the common law, replacing it with a relatively high standard of proof, even higher than negligence. After *New York Times*, a defendant in a defamation action has a constitutional guarantee that if the statements he makes regarding a public official are true or if he has a reasonable and justifiable belief in the truth of the statement, he will be insulated from civil liability.

1. Constitutional Malice Distinguished

Prior to *New York Times*, actual malice in the legal lexicon meant hate, spite or ill will. This standard, known now as common law malice, addressed the publisher's attitude toward the individual. *New York Times* defined constitutional malice to be the knowledge that a statement was false or a reckless disregard of the truth or falsity of the statement. After *New York Times*, actual malice was completely redefined and refocused to address not the publisher's attitude toward

25. *Id.* (citing Post Publishing Co. v. Hallam, 59 F. 530, 540 (6th Cir. 1893)).
26. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
27. *Id.* at 279.
28. *Id.* at 279-80.

the individual but rather the publisher's attitude toward the veracity of the statement.

By redefining the term "actual malice" as knowledge that a statement was false or was made with reckless disregard of its truth or falsity, *New York Times* placed common law malice in serious question constitutionally. This redefining has caused no small amount of confusion in the lower courts, as the cases decided soon after *New York Times* implementing this new standard indicate.[29] The Court recently attempted to clarify the distinction between common law malice and constitutional actual malice in *Masson v. New Yorker Magazine, Inc.*[30] In *Masson*, the Court stated,

> actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or motive arising from spite or ill will. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.[31]

This clarification does make the distinction between the two forms of malice more evident; however, this holding does not overrule the strong line of decisions following *New York Times* that specifically held a "truth plus motive" standard to be an "error of constitutional magnitude."[32]

The Court's ultimate refutation of the common law malice does not affect the application and utility of common law malice in the determination of potential punitive damages or the existence of constitutional malice. Many states that do not subscribe to the "truth plus motive" defense require a showing of common law malice in order to award punitive damages.[33] Common law malice may also be probative of whether the publisher made the statement with the degree of negligence required to prove constitutional malice.[34] However, common

29. *See infra* text following note 44-61.

30. 111 S. Ct. 2419 (1991). *See also*, 1 SLADE R. METCALF & LEONARD M. NEIHOFF, RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS AND REPORTERS, § 1.67 (1992).

31. Masson v. New Yorker Magazine, Inc., 111 S. Ct. at 2429-30.

32. Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6, 10 (1970).

33. Reynolds Metal Co. V. Mays, 547 So.2d 518 (Ala. 1989); Burnett v. National Enquirer, Inc., 193 Cal. Rptr. 206 (Cal. Ct. App. 1983); Peoples v. Guthrie, 404 S.E.2d 442 (Ga. Ct. App. 1991); Lester v. Powers, 596 A.2d 65 (Me. 1991); Stresen-Reuter v. Hull, 1990 WL 109877 (Ohio Ct. App. 1990); Hamilton v. Petroleum Co., 769 P.2d 146 (Okla. 1989); DiSalle v. P.G. Publishing Co., 544 A.2d 1345 (Pa. Super. Ct. 1988); Ryan v. Herald Assoc. Inc., 566 A.2d 1316 (Vt. 1989); Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992).

34. Tucci v. Guy Gannett Publishing Co., 464 A.2d 161 (Me. 1983). *See also*, METCALF & NEIHOFF, *supra* note 30, at § 1.67. "The Supreme Court has repeatedly instructed and reminded lower courts that *actual malice* in the constitutional sense is markedly different from *actual malice* in the common law sense. The former standard, which herein is being characterized as *constitutional malice*, focuses 'on the conduct and state of mind' of the media defendant at the time of publica-

law malice alone is not sufficient to prove constitutional malice.[35] One court stated, "[w]hile 'ill will' is not an element of the legal definition of 'actual malice'. . . it is nevertheless relevant and admissible as evidence in the determination of whether defendant possessed a state of mind highly conducive to reckless disregard of falsity."[36]

2. Garrison v. State of Louisiana—*"Truth Plus Motive" Addressed*

The United States Supreme Court in *Garrison v. State of Louisiana*[37] had the opportunity to interpret and implement the new constitutional malice standard only eight months after *New York Times* was decided. Its decision in *Garrison* sent a clear message that the "truth plus motive" defense was unconstitutional.

Garrison dealt with an appeal from a criminal libel conviction. The district attorney of Orleans Parish, Jim Garrison, was engaged in war of words with eight judges of the state district court over operating expenses for the vice division of the district attorney's office.[38] During a press conference, Garrison accused the judges of being inefficient, lazy and susceptible to the influence of racketeers.[39] Garrison was tried and convicted of criminal defamation under the Louisiana criminal defamation statute.[40] The conviction was affirmed by the Supreme Court of Louisiana,[41] but the United States Supreme Court reversed.

The *Garrison* opinion, authored by Justice Brennan, applied the reasoning of *New York Times*, a civil libel suit, to a criminal libel pros-

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tion, in particular, the defendant's awareness of the truth or falsity of the matter published. This constitutional standard can also be referred to as *scienter* . . . Common law malice, on the other hand, focuses on the defendant's attitude toward the plaintiff. This term refers to a feeling of ill-will, spite, hostility, or deliberate intent to harm." *Id.*

35. W. WAT HOPKINS, ACTUAL MALICE—25 YEARS AFTER *Times v. Sullivan* 150-52 (1989).

36. Cochran v. Indianapolis Newspapers, 372 N.E.2d 1211, 1220 (Ind. 1978). The court reasoned that a determination of the *New York Times* standard was not a clear cut, bright line formula. The court stated, "Appellant's estimate of the probability of falsity of its publications was not derived with mathematical exactness from purely objective factors. It was certainly influenced by various considerations one of which might very well have been appellant's hatred for appellee. Ill will evidence might also tend to prove that appellant published in spite of its estimate of a probability of falsity." *Id. See also* Moore v. Bailey, 628 S.W.2d 431, 434 (Tenn. Ct. App. 1981).

37. 379 U.S. 64 (1964).

38. The district attorney in this case was Jim Garrison, the only prosecutor to bring an action in the John Kennedy assassination. Garrison's efforts were recently depicted in Oliver Stone's movie *JFK*.

39. Garrison v. Louisiana, 379 U.S. 64, 66 (1964).

40. LA. REV. STAT. ANN. § 14:47 (West 1950).

41. State v. Garrison, 154 So.2d 400 (La. 1963).

ecution. The Court held that a public official would be allowed a criminal remedy only if he established that the statement was made with constitutional malice. Paralleling the reasoning in *New York Times* and highlighting the importance of robust and wide open public debate, Justice Brennan stated,

> debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician."[42]

It follows from this opinion that a "truth plus motives" defense will not stand up to constitutional scrutiny where the discussion of public affairs is concerned.

Fear of being forced to prove motive had and continues to have the same chilling effect that strict liability had for the statements considered in *New York Times*. Consequently, the "truth plus motive" defense must fall in front of the superior interests of an unfettered press. The Court sent an unequivocal message that true statements were absolutely protected regardless of motive; only when a speaker makes false statements or makes a statement with a high degree of awareness of its probable falsity, may a statement regarding a public official be the subject of civil or criminal sanctions.[43]

As a result of the *Garrison* and *New York Times* decisions and the protections established therein, any requirement such as Nebraska's that the defendant prove that he published the statement without ill-will violates the First Amendment. The First Amendment violation occurs because the true statement motivated by ill-will is still a true statement that contributes to the marketplace of ideas. It obviously is not false nor is it made with a high degree of awareness of its probable falsity.

The Court's decision directly undermined the "truth plus motive" defense when it pointedly stated, "[f]or, contrary to the *New York Times* rule, *which absolutely prohibits punishment of truthful criticism*, the statute directs punishment for true statements made with 'actual malice.' And 'actual malice' is defined . . . below to mean 'hatred, ill will or enmity or a wanton desire to injure.' "[44] It reasonably follows then that truthful speech is absolutely protected, and any punishment of truthful criticism of the official activity of public officials is absolutely prohibited.

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42. Garrison v. State of Louisiana, 379 U.S. 64, 73 (1964)(quoting Noel, *Defamation of Public Officers and Candidates*, 49 COL. L. REV. 875, 893 (1949).)

43. *Id.* at 74.

44. *Id.* at 78 (emphasis added).

3. *Defamation After* New York Times *and* Garrison

Through these two decisions, the United States Supreme Court radically changed the law of defamation, established constitutional standards for defamation law, and altered the list of elements necessary to establish a defamation cause of action. The five elements now required to establish a constitutional defamation action under constitutional principles are:

1) A defamatory statement of fact relating to the plaintiff;
2) falsity of fact;
3) publication to third parties;
4) fault (knowledge that the statement was false or reckless disregard for its truth or falsity); and
5) injury.[45]

The new fault standard developed by the United States Supreme Court which is specifically applied to public officials and figures, is found in § 580A of the Restatement (Second) of Torts. This section reads,

> One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
> (a) knows that the statement is false and that it defames the other person, or
> (b) acts in reckless disregard of these matters.[46]

The truth defense is also presented in the Restatement § 581A which states, "one who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."[47] Common law malice, defined as ill-will or improper motive, is no longer a permissible element of defamation.[48] The publisher must still make the statement with the requisite degree of fault in order for there to be defamation, but the focus of the fault inquiry is placed on the attitude of the defendant toward the statement's veracity rather than on the defendant's attitude toward the subject of the statement.

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45. McCrory & Bernius, *supra* note 10, at 101-02.
46. RESTATEMENT (SECOND) OF TORTS § 580A (1989).
47. RESTATEMENT (SECOND) OF TORTS § 581A (1989).
48. Comment a states,

> To create liability for defamation there must be publication of matter that is both defamatory and false. There can be no recovery in defamation for a statement of fact that is true, *although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.*
>
> Several states have constitutional or statutory provisions to the effect that truth of a defamatory statement of fact is not a defense if the statement is published for 'malicious motives' or if it is not published for 'justifiable ends' or on a matter of public concern. There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment requirements of freedom of speech and of the press, and its validity is very dubious."(emphasis added)

4. New York Times *and* Garrison *Interpreted*

Despite Brennan's seemingly unequivocal language in *New York Times* and *Garrison*, lower federal courts and state courts could not seem to implement the new defamation rules. Thus, only a few months after *Garrison* was decided, the Court was required to clarify that case's holding in *Henry v. Collins*.[49] This civil libel suit arose out of a civil rights leader's statements alleging that his arrest was part of a "diabolical plot" in which the plaintiffs participated.[50] The Court determined that the trial court's jury instruction misapplied the *New York Times* and *Garrison* holdings. The erroneous instruction read, "[t]he court instructs the jury for the plaintiff that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of rights and interests of the person defamed."[51] The Court noted that these instructions might well have been wrongly understood by the jury to allow recovery "on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood."[52] The trial court's instruction did not require the jury to find common law malice; rather the instruction impermissibly allowed the jury to consider the speaker's motive. The Court's decision required that any reference to the speaker's motive be expunged from the instruction so as to entirely remove common law malice from the jury's deliberations. This excising of any mention of common law malice indicated the Court's intent to remove motive from the realm of defamation law except in situations where motive may be relative to proof of constitutional malice.[53]

The Court again clarified the distinction between constitutional malice and common law malice in *Beckley Newspapers Corp. v. Hanks*.[54] During the trial, the judge had instructed the jury that it could find for the plaintiff if the defendant's newspaper had published the allegedly libelous stories with "bad or corrupt motive."[55] The Court was unable to rule on the error of these instructions because the defendant had not objected to them during the trial. Nonetheless, the Court, in dicta, noted that an instruction such as the one given allowed a finding of libel based on common law malice and, consequently, was "clearly impermissible" and an "erroneous interpretation of *New York Times*."[56] The Court ultimately reversed a $5,000 verdict in favor of

49. 380 U.S. 356 (1965). The opinion is generally very short and extremely short for a Supreme Court opinion—only 1 1/2 pages long.
50. METCALF & NEIHOFF, *supra* note 30, at § 1.22.
51. Henry v. Collins, 380 U.S. 356, 357 (1965).
52. *Id.*
53. *See supra* notes 33-36.
54. 389 U.S. 81 (1967).
55. *Id.* at 82.
56. *Id.* The Court also stated that the defendant had offered inadequate instructions. *Id.*

the elected clerk of the circuit court, basing its decision on the absence of sufficient proof of constitutional malice in the record.

In May of 1970, the Supreme Court revisited the distinction between constitutional malice and common law malice in *Greenbelt Cooperative Publishing Ass'n v. Bresler*.[57] In *Greenbelt*, a prominent real estate developer, Bresler, was negotiating with the city of Greenbelt, Maryland for a zoning variance to build a housing complex. The city also wanted to purchase land that Bresler owned in order to build a new high school. Several city council meetings were held to discuss the issues presented by these land deals. In the course of the public debate local newspapers characterized Bresler's negotiating position as "blackmail".[58] As a result, Bresler brought a civil libel action based on these stories.

The trial judge instructed the jury that it could find liability if the articles had been published "with malice *or* with a reckless disregard of whether they were true or false."[59] The judge further defined "malice" to mean spite, hostility or deliberate intention to harm.[60] Consequently, the Court noted that, "the jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility."[61] The jury returned a verdict for the plaintiff, and the Maryland Court of Appeals affirmed the verdict.[62] The Court began its discussion by characterizing the jury instructions as an "error of constitutional magnitude."[63] It viewed these instructions alone, characterizing malice in the traditional common law sense, as enough to reverse the judgement.

The Court's most recent statement regarding the constitutional nature of the defense of truth came in *Milkovich v. Lorain Journal Co.*[64] The Court stated that, at least in media cases, "a statement on matters of public concern must be provable as false before there can be liability under state defamation law."[65] The Court once again indicated that a true statement may not be the subject of a defamation action.

Throughout the decisions discussed above, the Supreme Court has indicated that at least in libel actions involving the criticisms of public officials in their official capacity, truth, without any limitations or qualifications, is a complete defense.[66] The "truth plus motive" de-

57. 398 U.S. 6 (1970).
58. *Id.* at 7.
59. *Id.* at 9 (emphasis in original).
60. *Id.* at 10.
61. *Id.* at 9.
62. *Id.* at 8.
63. *Id.* at 10.
64. 497 U.S. 1 (1990).
65. *Id.* at 11.
66. All of the defendants in the cases previously discussed arguably would fall into the category of "public official" or "public figure" under the current tests. The

fense required in Nebraska and other states is in direct contradiction to these holdings. Although the *New York Times* opinion did not directly address the "truth plus motive" defense, it laid the foundation for its demise by redefining "actual malice" and by placing importance on a free and uninhibited public debate. The Court in *Garrison* directly declared the "truth plus motive" defense to be unconstitutional in either a civil or criminal case. In the *Henry*, *Beckley*, and *Greenbelt* decisions, the Court reiterated the distinction between constitutional and common law malice and restated *Garrison*'s declaration of the defense's impermissibility. These decisions indicate the unequivocal nature of the Court's determination that truth alone is a sufficient defense to a libel action and that common law malice, as embodied in the "truth plus motive" defense, is not valid at least where public affairs or officials are involved. Since the *Milkovich* decision, the Court has not had occasion to comment on the "truth plus motive" defense. This may be because these opinions clearly indicate this defense cannot withstand constitutional scrutiny and, thus, no further clarification is needed.

III. ACTUAL MALICE IN NEBRASKA LAW

A. Statutory Interpretation

Nebraska statute § 25-840 appears to be a straightforward statement of the generally accepted rule that truth is a complete defense to libel. The requirement of "actual malice" appears in the statute's provision, "the defendant may allege the truth of the matter charged as defamatory. . . . The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice."[67]

On first consideration the statute is unexceptional, but on second consideration the constitutional malice standard, if that is in fact what is intended, appears in a situation that makes little sense. If actual malice is understood to mean constitutional malice then the statute would read "The truth in itself and alone shall be a complete defense unless it shall be proved . . . that the publication was made with *falsity or with a reckless disregard as to it veracity*." This makes no sense or it is at least a restatement of the obvious. Consequently, the legislature's inclusion of actual malice in a statute establishing the truth de-

Supreme Court has limited these holdings to public figure defamation cases. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 (1975), the Court acknowledged that it had "carefully left open the question of whether the First or Fourteenth Amendment require that the truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure." *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

67. NEB. REV. STAT. § 25-840 (Reissue 1989 & Cum. Supp. 1992).

fense is misplaced. Actual malice requirements belong in the statute that establishes the elements of the tort. The presence of actual malice in this statute can only indicate that the legislature intended common law malice. Consider the statute as restated: "The truth in itself and alone shall be a complete defense unless it shall be proved . . . that the publication was made *with ill-will and for justifiable ends.*" As this analysis indicates, the only logical interpretation the court can make of the statute is that which defines actual malice as common law malice.

B. Nebraska Case Law

Nebraska case law reveals that the court's interpretation of "actual malice" as common law malice places Nebraska in the "truth plus motive" minority making the statute unconstitutional as applied.

The Nebraska Supreme Court established the "truth plus motive" defense in several early civil and criminal defamation actions. The most succinct formulation of the defense came in *Pokrok Zapadu Pub. Co. v. Ziskovsky*, an 1894 slander action.[68] There, the court stated that "it would seem that even the truth is not a complete defense in an action for libel, unless the libel was published with good motives and for justifiable ends."[69] In *Ziskovsky*, the plaintiff was accused of embezzling $4.75 from a Bohemian cemetery association. The Nebraska Supreme Court overturned the district court's decision because the defendant, a local Bohemian language newspaper, failed to present any evidence that the publisher was not motivated by malicious intent. The court stated that, "In the absence of all evidence the law presumes that, in the publication of an article which is libelous upon its face, the publisher was actuated with a malicious intent."[70] The court, in essence, created a rebuttable presumption of common law malice which required a defendant to prove his motive regardless of the obvious truth of the statement. Subsequent cases did not utilize this presumption, but the *Ziskovsky* court's strict use of it is indicative of the premium early defamation law placed on the vindication of a man's reputation.[71]

68. 42 Neb. 64, 60 N.W. 358 (1894). While *Ziskovsky* is cited here for its interpretation of the "truth plus motive" defense, it is interesting to note that the court specifically rejected a form of constitutional malice as defined by *New York Times*. The court stated, "[t]he publishing company did plead that at the time it made the publication it had reason to believe, and did believe, that the charges made therein were true. This was not a defense. It is no defense to a suit for libel that the party sued had reasonable grounds to believe that the charge made was true. Such facts, if shown, would not relieve the publisher of liability." *Id.* at 78, 60 N.W. at 362.

69. *Id.* at 72, 60 N.W. at 360.

70. *Id.* at 78, 60 N.W. at 362.

71. See *infra* notes 86-95.

In *Larson v. Cox*, The Nebraska Supreme Court interpreted the statutory predecessor of § 25-840, § 132 of the Nebraska Civil Procedure Code, to allow truth as a complete defense in slander cases.[72] The defendant in *Larson* had stated publicly that the plaintiff had committed larceny. The court stated, "The truth of a defamatory publication is still a complete and perfect defense in a criminal case irrespective of the motive or object of the publisher."[73] The court continued to distinguish *Ziskovsky* and its requirement of the "truth plus motive" defense stating that, "it is not necessary at this time to either affirm or deny the doctrine of these cases, as the constitutional provision with which they deal has no reference to actions for slander."[74]

Of the early cases, *Wertz v. Sprecher*, a 1908 decision, seems to best develop the desire for personal vindication with which proponents attempt to justify the "truth plus motive" defense.[75] In *Wertz*, the county attorney of Colfax County brought a civil libel action against the publisher of the local newspaper.[76] The defendant presented evidence establishing the truth of the allegations made in the story. The trial judge instructed the jury that if they found the evidence to be true, they should find for the defendant. No mention was made at the trial level of any requirement that the statement be made with ill-will, and the jury returned a verdict for the defendant. The Nebraska Supreme Court overturned this decision after a thorough discussion of the justifications behind the "truth plus motive" defense.

The court based its decision and adoption of common law malice on a comparative interpretation of the 1866 and 1875 Nebraska Constitutions. The 1866 constitution stated,

> In all *criminal prosecutions* or indictments for libel the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted.[77]

The correlating provision in the 1875 Nebraska Constitution stated,

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trial for libel, BOTH CIVIL AND CRIMINAL, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense[78]

The court noted that the 1866 provision required good motives for

72. 68 Neb. 44, 93 N.W. 1011 (1903).
73. *Id.* at 45-46, 93 N.W. at 1012.
74. *Id.*
75. 82 Neb. 834, 118 N.W. 1071 (1908).
76. *Id.* at 834, 118 N.W. at 1071. The article stated, "County Attorney Wertz for the prosecution and George W. Wertz for the defense get together and agree upon a compromise and the wise county board upon motion duly made, seconded and carried, endorse it." *Id.*
77. NEB. CONST. of 1866, art I., § 3 (emphasis added).
78. NEB. CONST. art. I, § 5 (emphasis added).

criminal libel actions only while the 1875 version added civil libel and slander to the provision. The court credited the inclusion of civil defamation in the 1875 version as evidence of the constitutional convention delegates' conscious desire to apply "truth plus motive" defense to all forms of defamation. Noting that the individual convention delegates were predominately lawyers aware of the meaning and effect of their words, the court stated that "the fact that the change was adopted without debate demonstrates that the words employed in the amendment were well known as applied . . . and had a general and well understood meaning, which it was intended that they should continue to have."[79]

The court in *Wertz* cited three states, Massachusetts, Maine, and Florida, as influential precedent for their acceptance of the "truth plus motive" defense.[80] All of the precedents on which the Nebraska Supreme Court relied on in *Wertz* have since been overturned.[81] At the time, the court completely overlooked the fact that Massachusetts' and Maine's defense was statutorily based and did not result from a state constitutional interpretation.[82] Moreover, the Florida case cited by the court was not decided until ten years after the Nebraska constitutional convention prepared the questionable provisions and in no way could have influenced the deliberations of the convention delegates.[83]

The court also favorably cited *People v. Croswell*, a New York criminal libel action in which Alexander Hamilton unsuccessfully asserted the "truth plus motive" defense.[84] Hamilton's formulation of the defense provided, "liberty of the press consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individual."[85] The court recognized that *Croswell* was a criminal action that may have been of questionable relevancy to a civil action but did not find this difference to be of any overwhelming importance.[86]

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79. Wertz v. Sprecher, 82 Neb. 834, 837, 118 N.W. at 1071, 1072 (1908).
80. *Id.* at 839-40, 118 N.W. at 1073.
81. *See infra* notes 172-181 and accompanying text.
82. *See* Franklin, *supra* note 2, at 797-805, 838. Franklin presents the argument that constitutional language can be interpreted to provide an "outer limit" reading that establishes a distant boundary which state legislatures are not to pass. In fact statutory interpretive rules are quite different from those used to interpret constitutions. If a statute is clear on its face it is unnecessary to resort to legislative history and purpose. However, when one is interpreting a constitution, resort to the intent of the authors is often crucial. *See also* Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d. Cir. 1955).
83. The Florida case was decided in 1885. Jones, Varnum & Co. v. Townsend's Adm'x, 21 Fla. 431 (1885).
84. 3 Johns. Cas. 337 (1804).
85. *Id.* at 360.
86. *Croswell* was a criminal defamation action brought against Harry Croswell for

One explanation the *Wertz* court gave for its opinion was based on the view that, "kicking the reformed is 'repugnant to crudest ideas of justice.' "[87] This comment presents one of the more common justifications for the "truth plus motive" defense. Proponents of the defense often state that a man's past is best left alone when he has sufficiently reformed himself to a position of respect in the community.[88] Adopting a high moral tone, the court discussed the rule stating, "It is repugnant to the crudest ideas of justice to say that, under such circumstances, the truth of a recital of past history ought to entitle a defendant to a verdict in a civil action."[89] The *Ziskovsky* court also addressed, rather poetically, the notion of fresh start for the reformed man alluded to in the *Wertz* opinion. In reply to the defense counsel, the court stated,

> [I]t must not be forgotten that the same constitution which guaranties the freedom of the press guaranties also to the individual life, liberty, the pursuit of happiness, the protection of property, and, impliedly at least, reputation. To all well disposed persons a good reputation is as dear and as valuable as property. Indeed, a reputation for honesty is the only property possessed by many people. It is not striking down the "liberty of the press" to hold it civilly responsible for spreading broadcast over the land the false charge that an individual has been guilty of a crime.[90]

This justification of the "truth plus motive" defense has special appeal today when the media seems to take every opportunity to delve into the long hidden past of every public figure.[91] However, the de-

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publishing certain "scandalous, malicious, inflammatory, and seditious matters of and concerning" Thomas Jefferson. *Id.* at 338. While arguing for the defense Alexander Hamilton presented the classic formulation of the "truth plus motive" defense. This defense was not successful in Croswell's case but was ultimately included in New York's constitution and defamation statues. Franklin, *supra* note 2, at 792.

87. Wertz v. Sprecher, 82 Neb. 834, 838, 118 N.W. 1071, 1072 (1908).

88. *Id. See also* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 130-31 (1986). Rosenberg points out that the rationale for adopting such a rule changed over time from the concept of protecting the "best men" to protecting the private person who, having once committed an indiscretion, has now reformed. The advocates of this form and rationale of the test saw it as a protection of the individual's privacy.

89. Wertz v. Sprecher, 82 Neb. 834, 838, 118 N.W. 1071, 1072 (1908).

90. Pokrock Zapadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 79, 60 N.W. 358, 362 (1894). Interestingly, the court indicates that the paraphrase "life, liberty, the pursuit of happiness" is of constitutional origin. This classic statement of American social and political beliefs comes not from the Constitution but rather from the Declaration of Independence.

91. This criticism of an overreaching press is not unique to today. Harrison Gray Otis, prominent Massachusetts attorney, in 1823 offered a similar criticism of the press. "Otis contended that unfortunately, public and private virtue do not always go together; many great public leaders led less than exemplary private lives. But the community's interest in good government might suffer if fear of scandalmongers kept talented people out of public service. Common sense, argued Otis, suggested that, in 999 instances out of 1000, attacks on public officials stemmed

fense, as formulated by Hamilton in 1804, served a better purpose in the late Nineteenth century when men entered politics out of a sense of public duty. The defense in effect protected the "best men" and safeguarded the integrity of public debate.[92] One commentator stated,

> To most members of the early nineteenth century's legal and political establishments, the Hamiltonian emphasis upon truth, good motives, and justifiable ends seemed a wise and legitimate accommodation between the need for protecting political criticism and the necessity for protecting the reputations of the best men and for safeguarding the integrity of public debate.[93]

The altruistic Cincinnatus throwing down his plow to serve the state[94] may have been an apt metaphor in early America; however, the metaphor is somewhat hollow today when politics is viewed as a profession staffed by professional life-time politicians.[95] Moreover, Eighteenth Century Americans did not have the massive entertainment industry and all its excesses forced on them as people do today. While the discussion of the media or entertainment figure may not be vital to public debate or directly further the goals of self-government, defamed media stars can hardly be heard to complain of a defamatory statement or an invasion of privacy when they thrust themselves and their lives in the faces of the American public.

The court distinguished *Larson* and its holding that the truth is a complete defense on the grounds that it involved a slander action whereas the action in *Wertz* was based on libel.[96] The court stated, "*Larson v. Cox* was a slander suit, and all of the suggestions therein concerning a defense in libel cases is dictum. . . . In so far as the dictum in *Larson v. Cox* is opposed to the earlier cases, it is not adopted but disapproved, nor was it ever law in this state."[97]

Strangely, the Nebraska Supreme Court and more specifically Justice Root, the author of the *Wertz* opinion, issued an opinion one year after *Wertz* that defined malice quite differently. In *Sheibley v. Nelson* the court stated that,

> malice in law will be presumed from the publication of an article libelous per se, and that presumption will become conclusive unless the truth of the libel is

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purely from malicious motives and from 'love of gossip' rather than from any real desire to inform the public." ROSENBERG, *supra* note 88, at 119.

92. *Id.* at 110. "Hamilton hoped to convince lesser minds of both the need for permitting political criticism against public leaders who merely pretended to possess republican virtue and of the necessity for limiting defamatory attacks against the reputations of truly virtuous public figures." *Id.*

93. *Id.* at 260.

94. Cincinnatus was a Roman citizen who desired only to live a simple life on his farm. When the state needed his services to stave off enemy attacks, he dutifully set asides his wishes and served the state.

95. *See generally* Mark V. Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 KY. L.J. 753 (1976).

96. Wertz v. Sprecher, 82 Neb. 834, 836, 118 N.W. 1071 (1908).

97. *Id.* 836-37, 118 N.W. at 1071, 1073.

established. *Such malice does not mean hatred or ill will, but the want of legal excuse for the publication.*[98]

"Want of legal excuse" is close to publishing without good motives or for justifiable ends. While this definition is not a quoted repetition or a restatement of the court's prior definition, it is something akin to hatred or ill-will. "Want of legal excuse" focuses on the reason for publication not the intense feelings conveyed by the ill-will definition and actually broadens the scope of situations and range of motivations that will defeat the truth defense. Under this "want of legal excuse" formulation the publisher, unmotivated by hatred or ill-will, who prints a humorous account of a true occurrence in good hearted jest could be successfully sued for defamation. Whereas, under an "ill-will or hatred" formulation of the defense only the intense harmful motivation would suffice.

Whitcomb v. Nebraska State Education Association[99] presented the Nebraska courts with the first opportunity to construe the truth defense after the Supreme Court's decision in *New York Times*. *Whitcomb* was a civil libel action brought by a teacher who was discharged because she was an alleged troublemaker. The majority opinion made no effort to reconcile the "truth plus motive" defense with *New York Times*, *Garrison* or any of the subsequent cases that held such a defense to be unconstitutional. In fact, the court hardly discussed the truth defense at all.

Justice Smith's concurring opinion in *Whitcomb* did raise the issue of whether the "truth plus motive" defense complied with *New York Times* decision and was thus constitutional. He stated, however, that "[n]o constitutional issue of a federal dimension having been raised, the majority opinion does not answer the question: Is the judgement under review a product of an unconstitutional interference with free expression?"[100] Had the issues of the constitutionality of the "truth plus motive" defense and the statute that established it been called into question, it seems to follow from these comments that the court would have addressed them.[101]

The court based its decision on *New York Times* principles in *Kloch*

98. 84 Neb. 393, 395-96, 121 N.W. 458, 459-60 (1909)(emphasis added).

99. 184 Neb. 31, 165 N.W.2d 99 (1969).

100. *Id.* at 37, 165 N.W.2d at 102 (Smith, J. concurring).

101. The court once again avoided determining the constitutionality of the "truth plus motive" defense and Nebraska's statutes in Vodehnal v. Grand Island Daily Independent, 191 Neb. 836, 218 N.W.2d 220 (1974). The plaintiff in *Vodehnal* asserted that the statute establishing Nebraska's "truth plus motive" defense—§ 25-840—was unconstitutional. The court found other grounds to dismiss the suit and stated, "We do not reach the questions of unconstitutionality posed in the plaintiff's brief. The court will refuse to pass upon the constitutionality of a statute or a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court." *Id.* at 838, 218 N.W.2d at 222. It seems clear, given subsequent holdings, that the Nebraska Supreme Court will utilize this principle

v. Ratcliffe.[102] In *Kloch* the plaintiff, a locomotive engineer brought an action for slander against the railroad foreman for statements made regarding the plaintiff's falsification of a time log. The jury returned a verdict for the plaintiff, but the district court entered judgement notwithstanding the verdict for the foreman.

Nowhere in its discussion of malice did the court in *Kloch* refer to a precedential Nebraska decision. Instead the court defined malicious statements as those published "with knowledge of their falsity or with reckless disregard as to whether they are true or false."[103] Amazingly, the court specifically quoted United States Supreme Court language indicating that a jury instruction allowing a jury to impose liability based on a finding of "the defendant's hatred, spite, ill-will or desire to injure" was clearly impermissible.[104] The court further stated that, "Ill will toward the plaintiff, or bad motives are not elements of the *New York Times* standard."[105]

In 1986, the Nebraska Supreme Court decided *Deaver v. Hinel*. In *Deaver*, a former county sheriff brought a libel action against a newspaper columnist for stories criticizing the sheriff's official conduct.[106] Once again the case was decided strictly on the principles set forth in *New York Times*, including the interpretation of actual malice as constitutional malice established therein.[107] This was most likely because the defendant based his cause of action on the *New York Times* principles.[108] The court sidestepped the determination of the constitutionality of the "truth plus motive" defense and Nebraska's original statutory interpretation of actual malice as common law malice. It stated that,

> [t]his case is one of federal constitutional law, the analysis and outcome are controlled by *New York Times Co. v. Sullivan* and its progeny. Neither party relies on or cites Neb. Rev. Stat. § 25-840. . . . The issue not squarely before us, we do not decided the effect, if any, of this statute on public official libel lawsuits or the effect, if any, of *New York Times Co. v. Sullivan* on the statute.[109]

Deaver, Kloch, and *Whitcomb* do little to help predict the future of the "truth plus motive" defense in Nebraska. Rather it only indicates two practical matters: 1) that the court knows how to correctly approach

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of judicial abstention until compelled by the circumstances of a particular case to confront the constitutionality of the defense.

102. 221 Neb. 241, 375 N.W.2d 916 (1985).
103. *Id.* at 249, 375 N.W.2d at 921.
104. *Id.* at 250, 375 N.W.2d at 922, citing Letter Carriers v. Austin, 418 U.S. 264, 281 (1974).
105. *Id.*
106. 223 Neb. 529, 391 N.W.2d 128 (1986).
107. *Id.*
108. The court stated that, "Deaver filed this action, claiming that the allegations in the column and letter about him, were false, and were made with actual malice as defined in *New York Times Co. v Sullivan*." *Id.* at 532, 391 N.W.2d at 130.
109. *Id.* at 532, 391 N.W. 2d at 131.

the truth defense and 2) a party wishing to avoid the "truth plus motive" defense need only plead and argue *New York Times* principles to sidestep the issue. These matters are evident from the court's willingness to avoid ruling on the constitutionality of the statute and their unexceptional application of the constitutional malice standard.

The early cases, *Larson* and *Wertz*, indicate that Nebraska courts recognized a distinction in libel and slander cases. In *Larson* the court allowed the truth of the slanderous statements as a complete defense to a slander action.[110] Consequently the court could have allowed truth as a complete defense in *Kloch*, a slander action, and not relied on Constitutional principles or cases. In *Wertz*, the Nebraska Supreme Court rejected truth as a complete defense to libel actions and limited *Larson* to slander situations.[111] However, in *Deaver*, a libel action, the court did not apply the "truth plus motive" defense, and failed to rely on *Wertz* or any other Nebraska precedent. The court had in one short year the ability to remove an archaic element of defamation law and a presently artificial distinction between libel and slander, but the court refused to discuss the "truth plus motive" defense much less strike it from Nebraska law. Consequently, the distinction between libel and slander, the court established long ago in *Larson* and *Wertz*, may be currently relevant.

Turner v. Welliver, a civil libel case decided in 1987, does indicate the direction the Nebraska courts intend to follow with respect to the "truth plus motive" defense, at least as it relates to a private figure.[112] In *Turner*, an insurance agent brought a libel action against the president of a marketing corporation, based on a letter written about the agent. The letter implied that the plaintiff had forged the signature of several customers on crop insurance policies. The defendant presented evidence indicating that all of the statements in the letter regarding the plaintiff were true. The trial court found that the defendant was not liable. It based this decision on *New York Times* principles as articulated in the Restatement (Second) of Torts § 580B.[113] The Nebraska Supreme Court upheld the trial court but still examined the "truth plus motive" defense. Stating that it had never defined common law actual malice in a majority opinion,[114] the court determined that actual malice may be defined as "hate, spite, or ill will."[115] The court used the permissive "may' in defining actual mal-

110. *See supra* notes 73-74.
111. *See supra* notes 96-97.
112. Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298 (1987).
113. Interestingly, the court never explicitly declared that the trial court's reliance on the *New York Times* standards as embodied in the Restatement was an error.
114. *Wertz* was a majority opinion.
115. Turner v. Welliver, 226 Neb. at 290, 411 N.W.2d at 309. Continuing to state that this definition was adopted only for purpose of the present case, the court did not unilaterally adopt a common law malice standard.

ice rather than the directive "shall." These subtle semantics may indicate that the court is not absolutely defining actual malice, but only offering a permissible interpretation subject to change.

Nebraska statutes and the Nebraska Constitution retain the "truth plus motive" defense. Nebraska court decisions indicate that the "truth plus motive" defense may be the current law in this state, at least with respect to private figure cases. When viewed together, *Deaver* and *Turner* may indicate that in defamation situations involving public figures constitutional malice will be used, while in private figure situations the common law malice standard will be applied. However, the application of the *New York Times* standards in *Deaver* does not unequivocally establish which standards the court will apply in future public figure defamation cases. This uncertainty is the result of the court's explicit refusal to construe Nebraska's statute in light of constitutional standards.[116] The nimble steps that the court has taken to avoid review of the constitutionality of the defense in public figure cases may indicate that while the court realizes the unconstitutional character of a "truth plus motive" defense, it is not willing to squarely confront the issue a litigant appropriately asserts the defense's unconstitutionality or until legislative action indicates the direction to be taken.

IV. CONSTITUTIONALITY OF A "TRUTH PLUS MOTIVE" DEFENSE

The First Amendment of the Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[117] Read broadly, the First Amendment classifies all defamation law as law which abridges the freedom of the press and freedom of speech. However, the United States Supreme Court has held that some types of speech are not protected by the First Amendment, and defamatory speech is one of these types.[118] However, in *New York Times* the Supreme Court brought defamation law under the protection of the First Amendment when it stated that, "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[119] The Court recognized that the defamatory statement is inevitable in the rough and tumble world of public debate, and in order to avoid chilling desirable speech, some protection was required for the occasional misstep. It follows that if defamatory speech is to be measured by constitutional

116. *See* Deaver v. Hinel, 223 Neb. 529, 391 N.W.2d 128 (1986).

117. U.S. CONST. amend. I.

118. New York Times Co. v. Sullivan, 376 U.S. at 269-70.

119. *Id.* at 269.

standards then defenses to libel must also be measured by similar standards.

The language in *New York Times* and the subsequent United States Supreme Court decisions discussed above irrefutably indicate that Nebraska's "truth plus motive" defense is unconstitutional under current constitutional standards. It is difficult to imagine a more condemnatory statement of the defense than, "truth may not be the subject of civil or criminal sanctions where discussion of public affairs is concerned."[120] Given this statement, it appears that little more needs to be discussed regarding the impermissibility of the "truth plus motive" defense. Nonetheless, a closer review is necessary to highlight the inherent incompatibility of the "truth plus motive" defense with the First Amendment protection and the nature of public debate in this country.

A. Inhibitory Effects and Self-Censorship

Benjamin Franklin, a Founding Father and a journalist, stated in an *Apology for Printers* that "if all printers were determin'd [sic] not to print any thing till they were sure it would offend no body, there would be very little printed."[121] Although written well before the Constitution and a revolution were considered, Franklin's words highlight the inhibition and self-censorship caused by the "truth plus motives defense". The truth defense negates these effects because it provides the publisher with the assurance that he will not be liable for making true statements merely because some one feels the statements were published with the intention to inflict harm. This assurance, theoretically, leads the publisher to print or broadcast vast amounts of information, creating an informed public that is vital to a democratic government.

Conversely, the requirement that a publisher demonstrate good motives and justifiable ends, in addition to the truth of his statement, unnecessarily inhibits speech and causes self-censorship due to the subjectivity of the inquiry. The subjective nature of the good motives and justifiable ends inquiry makes the standards a court would utilize uncertain. Who can say exactly what a good motivation or a justifiable end is?[122] Extrinsic evidence of personal animosity or bias could be

120. *Id.* at 271-72.

121. Benjamin Franklin, *Apology for Printers*, *in* BENJAMIN FRANKLIN, WRITINGS 171 (J.A. Leo Lemay ed., 1987).

122. Early courts interpreted good motives to be any motivation to promote the public welfare. Justifiable ends usually meant a desire to inform the public of relevant information regrading the government or elections. LAWHORNE, *supra* note 20, at 61-63. Massachusetts defined "justifiable ends" as "pleading or other judicial proceedings, or petitions for removal of officers, or criticisms of public officials, or matters of common interest." Commonwealth v. Clap, 4 Mass. 163, 3 Am. Dec. 212 (1808); Commonwealth v. Blanding, 20 Mass. 304, 15 Am. Dec. 214 (1825).

used to establish that a person published a true statement without good motives, but it is difficult to see what type of evidence the publisher could present to vindicate his motives or to justify the situation.[123] Instead of a judicious weighing of recognizable standards, the trial could degenerate into a "yes, you did" versus "no, I did not" quarrel. The uncertainty generated from these subjective standards could cause the publisher to hesitate before fully reporting a story involving a public official. Even if the justifiable situations and motives are interpreted broadly, the media would still be overly cautious in publishing critical stories of public officials due to the possibility that the facts in a specific situation would fall within the definition but still present a flavor of ill-will to the trier of fact.[124]

In any defamation situation, the defendant must be prepared to prove the truth of the statement. In today's litigious climate where every questionable story is checked and rechecked, the publisher has probably already prepared to defend the truth of the article.[125] The publisher, however, has probably not prepared for an inquiry into the motive for publishing the story. Imagine the difficulty a publisher faces in attempting to convince a jury that his motivation was not a desire to lash out against a one-time rival or enemy but rather a disinterested desire to inform the public. It seems reasonable to assume that the publisher would face the difficult task of proving genuine public concern and an absence of personal animosity armed only with purely subjective evidence. The publisher could present his record of public service or publishing history, but even this seemingly objective proof could be overcome by the emotional and subjective evidence of personal relationships with the plaintiff. In the end, the question would be left to the whims of the jury, and it is not difficult to predict their result given the public hostility toward the media.

The burden a publisher might face in proving his good motive will likely be increased if the libel plaintiff is a popular public figure. One commentator has stated, "prejudice is a danger to all who publish unpopular truths, for again it may be difficult to convince a jury that the

123. Early cases interpreting what ends were justifiable held that the requirement of good motives and justifiable ends was met by an honest intent to inform citizens about public officials. LAWHORNE, *supra* note 20, at 62-64.

124. The possibility of juror bias would be prevalent in the often heated rhetoric of political debate where emotions run as high as the political stakes involved. *See notes* 108-11 and accompanying text. The overblown exaggeration is common in the political press, and Madison recognized the possible abuses that might follow in the political debate when he stated, "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press." 4 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION OF 1787, 571 (1876).

125. Harold W. Fuson, Jr. *Republication Review: The State of the Art*, 338 PLI/PAT 13-15 (1992).

unpopular speaker told the truth without improper motive."[126] The facts of *New York Times* illustrate this point. The plaintiff in *New York Times* was a popular, local, white Southern official who brought an action against four local, black ministers and the liberal Northern press that supported the civil rights movement. Considering the Southerner's ingrained prejudices and their siege mentality of the early 1960's, it is easy to understand the difficult task the defense lawyers faced in proving any issue in the case. Had the defense also been forced to prove the advertisements were run with a good motive, the outcome of the case might have been a foregone conclusion. It seems reasonable to say that no Southern juror of that time period could have been convinced that the New York Times was motivated by anything less than negative feelings and general animosity toward Southern institutions and government.[127]

Hostile public sentiment toward the media and the popularity of a public figure are factors a publisher would be forced to consider in deciding whether to refrain from publishing unpopular but possibly necessary truthful information if the "truth plus motive" defense is recognized. The United States Supreme Court highlighted these concerns in *Garrison*:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred. . . . Under a rule . . . permitting a finding of malice based on an intent merely to inflict harm, rather than an attempt to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician . . . [I]n the case of charges against a popular political figure it may be almost impossible to show freedom of ill-will or selfish political motives."[128]

The political arena is one of the primary areas that generates such strong emotion, promotes the development of extremely controversial figures, and would present the most difficult decisions for a publisher. It would be relatively easy for a defeated political candidate to present evidence that a smear campaign based on true facts was motivated by his opponent's desire to do him harm. However, the truthful information may have been vitally relevant to the defeated candidate's character or policies, but the publisher was forced to weigh the expense of defending his motivation against the necessity of informing the public. It would be the altruistic and possibly rare publisher who would tip the scales in favor of publishing the information and face a potential lawsuit. While it would be somewhat more difficult for a newspaper to prove it was motivated by ill-will rather than a desire to inform the

126. Franklin, *supra* note 2, at 809.

127. *See*, Harry Kalven, Jr. *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 194-200 (1964); Hall, *supra* note 18.

128. Garrison v. Louisiana, 379 U.S. 64, 70, 74 (1964)(quoting Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949)).

public, the mere threat of a lawsuit often suffices to restrict publication and inhibit the dissemination of information in an area where it is most needed.[129]

Considering the necessity of public debate and the potential of heated exchanges in the political arena, it becomes apparent that the "truth plus motive" defense is an inappropriate and illogical way to regulate the discussion of public affairs.[130] Animosity and motive are justifiable concerns when a government, frightened of sedition, attempts to suppress speech. However, when a government wants, needs, and is required to promote public speech and debates by its constitution, the true statement made in hatred is just as valuable as the true statement made from a sense of civic duty.

One of the primary purposes of the *New York Times* decision was to diminish the threat of large libel decisions[131] the reduction of which would increase the press' incentive to print the material necessary for a debate on public issues to be "uninhibited, robust, and wide open."[132] The "truth plus motive defense" is in contradiction to the Court's stated purpose. When a publisher is always forced to consider whether his motivation could be considered malicious, he will write a story differently or decide that the risk of publishing the story outweighs the benefit to the public. Such a result is not the uninhibited, robust and wide open debate the Supreme Court or the Founding Fathers envisioned.[133] In fact, such a result is self-censorship.

The Court did not address the self-censorship result of the "truth plus motive" defense in *New York Times*. They did, however, discuss the self-censorship that a strict liability standard would cause. The Court stated,

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions - and to do so on pain of libel judgements virtually unlimited in amounts - leads to . . . 'self-censorship.'. . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even

129. *See* note 131-33.

130. The motive of the publisher does not diminish the social utility of the discussion nor does it tip the balance in favor of protecting the public figures reputation. The Supreme Court indicated as much in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). "The Constitutional protection does not turn on the truth, popularity or social utility of the ideas and beliefs which are offered." *Id.* at 271 (quoting N.A.A.C.P. v. Button, 371 U.S. 415 (1963)). The Court expressed a similar sentiment in Garrison v. Louisiana, 379 U.S. 64 (1964). "Even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Id.* at 74.

131. The Court stated in New York Times v. Sullivan, 376 U.S. 254 (1964), "Whether or not a newspaper can survive a succession of such judgements, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

132. *Id.* at 270. *See also* David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 425 (1975).

133. *See supra* notes 117-120.

> though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."[134]

The Supreme Court was afraid that imposing strict liability and forcing the defamation defendant to prove the entire truth of a statement would cause the media to withhold true but difficult-to-prove statements from publication.[135] The "truth plus motive" defense realizes the Court's fears as it is more restrictive than a strict liability standard and the generally accepted truth defense. Not only must the libel defendant prove the truth of the statement but also that he published without ill will and for justifiable ends. In contrast to the difficult task the defamation defendant faces when required merely to prove the truth of the statement, the effort and expense required of a defamation defendant under the "truth plus motive" defense to prove that he published a true statement without ill-will or improper motive presents an almost impossible task.[136]

The exact type and amount of self-censorship that might result from the "truth plus motive" defense is difficult to determine. It may occur at any level of the process, and as one commentator stated, "[m]uch of it is inherently unmeasurable; it occurs whenever a reporter or editor omits a word, a passage, or an entire story, not for journalistic reasons but because of the possible legal implications."[137] The reporter and editor may begin making decisions not based on what is good news or vital to the public concern, but rather on the impact the story may have on a public figure. If this is so, the control of the press, albeit indirect control, is removed from the people and placed in the hands of public officials and figures. Such a result is reminiscent of the government's control of seditious libel and is diametrically opposed to the vision on which this country is based.

The people that make the actual decisions to suppress a story or news statement because of potential libel problems are usually not the

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134. New York Times v. Sullivan, 376 U.S. 254, 279 (1964)(quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).)

135. Anderson, *supra* note 132, at 428-29. This fear has been alleviated somewhat due to the fact that the burden of proving the truth of the statement has been shifted. Under *New York Times*, the libel plaintiff must prove the falsity of the statement at least in public figure cases. *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

136. "[D]efendants are often the real losers in libel suits today, even when they win in court, because the rules established to protect defendants' freedom of speech actually work against the First Amendment: by making it so expensive to litigate the question of 'knowing or reckless falsity,' for instance, the rules exert a 'chilling effect' on free expression, encouraging potential defendants to play it safe in their journalism." Robert J. Harley, *An Overview of the Uniform Defamation Act*, 338 PLI/PAT. 645, 653 (1992).

137. Anderson, *supra* note 132 at 430-31.

reporters and editors. It seems reasonable to say that the ultimate goals of the beat reporter are vastly different from the goals of the publisher and the libel lawyer. The journalism profession is powered by a strong professional ethic.[138] This professional ethic often generates a strong will to inform the public even at the risk of possible litigation. One commentator stated, "[A]lthough impossible to measure, this professional pressure to publish is probably the strongest force against self-censorship."[139] The publishers, station owners, and libel lawyers who will usually determine that a story is a potentially libelous may not share this altruistic desire to print "all the news that is fit to print." Their decisions will not be based on any journalistic commitment to informing the public.[140] In fact, these decision are quite often based on purely economic and legal reasons.[141] One commentator discussed this conflict of goals, stating:

> A reporter who has invested his time and talent in a story and risked his credibility by presenting it for publication has a strong interest in seeing it published or broadcast. The owner, on the other hand, usually has no psychological stake in the story, feels less professional pressure to publish it, and has a stronger financial incentive to avoid the risk. Thus, no matter how keenly the libel lawyer may appreciate the interest of the public (and the newsroom) in running the story, when a conflict develops he must protect the interests of his client the publisher, or station owner.[142]

The self-censorship caused by the "truth plus motives" defense affects not only the Nebraska media but also the entire national media complex. At first glance, it is difficult to see how a news story printed in a small Nebraska town could impact the journalist in Kentucky or California. But the national character of the news media requires

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138. *See* THE SOCIETY OF PROFESSIONAL JOURNALIST'S CODE OF JOURNALISTIC ETHICS, 1992.

139. Anderson, *supra* note 132, at 434. "Reporters and editors share a professional ethic that encourages them to seek to inform the public, even at the risk of libel litigation. This may even be institutionalized, so that it represents the prevailing ethic of a publishing or broadcasting organization; 'all the news that's fit to print' presumably includes some news that creates a danger of legal action. . . . Journalism reviews and media critics are becoming increasingly active in exposing press timidity. Editors, publishers, and broadcasters value the esteem of their professional peers, and the honors frequently go to those who have been willing to take chances." *Id.*

140. *Id.* at 438; *See also*, Fuson, *supra* note 125.

141. Anderson, *supra* note 132, at 438.

142. *Id.* at 439. The economic incentive of getting the best scoop has all but disappeared with the passing of the competing newspapers in a single city. Anderson stated, "[T]he press has virtually no economic incentive to publish anything that might lead to a libel suit. In the case of daily newspapers, whatever incentive was once provided by the danger that a competitor would publish the suppressed material has largely disappeared along with competition." *Id.* at 433. In 1963, 51 cities had competing daily newspapers; in 1973, 37 cities, and in 1983, 30 cities. The numbers today are much lower. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION—FREEDOM OF THE PRESS IN AMERICA 201 (1991).

every journalist covering a Nebraska topic to consider the defensibility of her motivation behind writing a story. One commentator wrote,

> news of politics, of business of education, of fashion, and a variety of topics is increasingly national news. To have the standards of responsibility hammered out on a state's rights basis when communications are disseminated to one Union is at least anomalous. . . . To have the balance struck not once but fifty times in as many states is ill calculated to serve the national interest."[143]

The facts of *New York Times* highlight the impact a local action can have on the national media. The advertisement that generated the L. B. Sullivan's libel suit appeared in the *Times*. In 1960, when the advertisement was published, there were only thirty-four daily subscribers to the *Times* in Montgomery, Alabama, the home of the plaintiff. In fact, only 394 daily copies of the *Times* were delivered in the entire state of Alabama, out of a total daily circulation of approximately 650,000. The *Times* had no corporate offices in Alabama, and its advertising revenues from Alabama in the six months prior to the advertisement had been $18,000 out of a total of $37,500,000.[144] From this limited circulation base, a local official was able to secure a $500,000 libel judgement from a national media source.[145]

In 1960, the international wire services were not as developed nor was the pervasive influence of television felt as extensively as it is today. With today's information flood, the reach of a libel plaintiff's action is far greater than L.B. Sullivan's was in 1960. Consequently, journalists across the country that pick up on a wire story involving a Nebraska public official could have their motives questioned in a distant court for running a story they did not even write. In reference to

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143. Willard H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 583 (1964).

144. Hall, *supra* note 18. The defense counsel of the *New York Times* made a special appearance to challenge the Alabama court's jurisdiction over the newspaper. Once commentator stated.

> Embry [defense counsel] argued that the Alabama courts had no jurisdiction in the case since only 394 of the 650,000 issues of the *New York Times* in which the ad appeared circulated in the state. To make the argument before the Alabama court, however, Embry was required to make what is known as a special appearance. Arguments before a judge in Alabama were usually made in what was called a general appearance. To argue a jurisdictional matter in a general appearance, however, rather than a special appearance, would be to concede that the court held jurisdiction. To make his special appearance, Embry followed the form given in a leading text, *Alabama Pleading and Practice Law*. The text was written by Judge Walter P. Jones—the very Walter P. Jones who was the trial judge in the Sullivan case. Jones, however, overruled his own book and held that Embry had made a general appearance, thereby placing the *Times* under the court's jurisdiction.

HOPKINS, *supra* note 35, at 14.

145. This judgement was the largest in Alabama history. The *New York Times* case was also the first time in United States history that the Supreme Court had issued a writ of certiorari to review a state libel judgement. LAWHORNE, *supra* note 20, at 216.

the tactic of pulling out of state media defendants into state courts, Justice Black in his concurring opinion to *New York Times* stated, "this technique for harassing and punishing a free press . . . is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers."[146]

B. Infringement on the Right of Self-Government

The proper functioning of our political system requires an informed electorate.[147] Whenever the public is deprived of truthful information regarding public affairs or officials, the voters do not possess the full range of information required to make informed decisions. Nebraska's requirement that any published statement be true and published with good motives and for justifiable ends in order to avoid a potential defamation action, inhibits the free flow of information and results in self-censorship of by the media industry.[148] As a result of this inhibitory effect, the Nebraska electorate may be deprived of all the pieces of information it needs to complete the picture of a public official or a public issue.

The First Amendment protects a person's right to obtain all the pieces of information necessary to make informed decisions through unfettered public debate. The United States Supreme Court has recognized the presence of this right in the First Amendment several times. Justice Brandeis stated in *Whitney v. California*,[149] "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Justice Marshall also stated in *Landmark Communication Inc. v. Virginia*,[150] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of government affairs."

146. New York Times Co. v. Sullivan, 376 U.S. 254, 295.

147. People seem to care about the government that serves them. Impassioned comment on government actions and public figures follows from this emotion. The Supreme Court recognized the vital nature of public debate and sought to protect such impassioned commentary in the *New York Times* opinion and the cases that followed it. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-80 (1964); Garrison v. Louisiana, 379 U.S. 64, 73 (1964); Greenbelt v. Cooperative Pub. Ass'n, 398 U.S. 6, 10-11 (1970). Discussing the necessity of both public debate and an uninhibited press in the operation of our government, the Court stated that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties, are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)(quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).).

148. *See* notes 121-146 and accompanying text.

149. 274 U.S. 354, 375 (1927).

150. 435 U.S. 829, 838 (1978).

However, individuals have long had a recognized interest and right to the vindication and protection of their personal reputations.[151] A man's reputation was often all he had as entered the new world of America, and many a duel was fought over the real slander or the imagined slight to a man's good name.[152]

Public debate is undoubtedly an essential and natural element of our society. However, our society has also long valued reputation and the right of every man to vindicate that reputation whenever he is defamed. Of these two competing interests, which is the more important? Must a person's interest in protecting his reputation fall in front of society's need for uninhibited public debate? The Supreme Court has indicated that it must. The Court has stated, "Where the criticism of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest secured by the Constitution in the dissemination of truth."[153] The Supreme Court discussed this balance more thoroughly in *New York Times*.[154]

Nebraska's "truth plus motive" defense does not provide the broad protection for public discussion that the United States Supreme Court's statements indicate that such debate should receive. It elevates the individual's interest in reputation above the societal need for public debate and self-government. The Supreme Court has indicated that, at least in public figure defamation actions, the public interest must outweigh the private.[155]

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151. Shakespeare stated this interest most poetically,

> "Who steals my purse steals trash;
> 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."

Othello Act III Sc. iii.

152. *See* W.J. CASH, THE MIND OF THE SOUTH (1939).

153. Garrison v. Louisiana, 379 U.S. 64, 70 (1964).

154. The importance to the state and to society of such discussion is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character is so small that such discussion must be privileged.

New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964).

155. Justice Douglas' concurring opinion in *New York Times* highlights a distinction offered by proponents of the "truth plus motive" defense as a justification. He felt that the private lives of public officials should be off limits to public discussion. Justice Douglas stated, "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. . . . Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment." *Id.* at 301-02. This statement should be contrasted with

That is not to say, however, that all speech is valuable to the public debate and that self-governing interests must always trump the personal interests in reputation. Defamation law and possibility the "truth plus motive" defense do have a place in the permissible regulation of speech and the discussion of private affairs.[156]

The Nebraska case, *McCune v. Neitzel*, presents a situation in which defamation law and the "truth plus motive" test could serve a legitimate regulatory purpose outside of the area of public debate.[157] In *McCune*, the defendant passed the rumor along that the plaintiff was infected with the HIV virus. The defendant had not contracted the virus, and as a result of the embarrassment and social disdain caused by this rumor, the defendant was forced to quit his hometown job and move to a distant city to secure work.[158] The defendant on appeal asserted that the plaintiff was required to prove that she had made the statements with malicious intent or ill will. The court, however, noted that since the defendant had not raised the truth of the defamatory remarks as a defense the plaintiff was not required to prove common law malice.[159]

The defendant's speech in this action arguably does not serve any self-governing purpose. A gossip's rumor that a local man had AIDS adds little to the marketplace of ideas. Even if such a rumor were true, the truth in this situation bears no direct relationship to the self governing process. The truth it only fuels the fires of gossip. In such a situation motive may be important. If the speaker was motivated by a desire to protect an unsuspecting sexual partner of the defendant then the "truth plus motive" defense does not hinder the legitimate purpose of protecting the speaker whose motive was to protect an individual and arguably public health. However, if the speaker was motivated by a desire to alert the customers of the local cafe about the hottest news in town, the "truth plus motive" defense serves the purpose of checking harmful speech that, although truthful, serves no le-

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Brennan's statement that "public men, are, as it were, public property." *Id.* at 269.

156. The regulatory/inhibitory distinction is highlighted by the "Fire" analogy. A person may not yell "Fire!" in a crowded theater without suffering the criminal and civil sanctions that would follow. These sanctions serve the necessary function of protecting public safety. Such regulation is necessary to a safe and orderly society and is within the scope of the self-governing purpose of the First Amendment. For example, the regulations that dictate how and when a group may conduct a public demonstration march or the regulations that indicate the process by which a person may petition the government are permissible regulation within the self-governing purpose of the First Amendment because they do not abridge the right to speak. They simply operate for the public's safety.

157. McCune v. Neitzel, 235 Neb. 754, 457 N.W.2d 803 (1990).

158. *Id.* at 758, 457 N.W.2d at 807.

159. The court stated. "Proof of common law malice is at issue only when truth or a conditional privilege has been asserted by the declarant." *Id.* at 810.

gitimate social purpose.[160]

Defamation law and the private figure/public figure distinction illustrate the distinction between the permissible regulatory function and the self-governing nature of the First Amendment. In a private defamation action, an individual allegedly harms another's reputation, and the defamed person may sue for damages. The United States Supreme Court has indicated that improper motive may be a reasonable and defensible element of private defamation.[161] The First Amendment should give no protection in the private defamation situation because "[a person's] verbal [or written] attack has no relation to the business of governing."[162] However, a similar attack made on a public official to uncover illegal activities or a comment offered regarding her fitness for office is a part of governing, constituting a citizen's participation in self government.[163] Motivation in this context is not relevant.[164] The publisher is exercising his right to participate in the process of governing, and "even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[165] Thus, "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' "[166] An individual's comments on public affairs or officials receive First Amendment protection because they "are 'public' issues concerning which under our form of government, he has authority, and is assumed to have competence, to judge. Though private libel is subject to control, political or seditious libel is not."[167]

The wisdom of any law regulating the free flow of information to the public must be balanced against the need for unfettered communication and discussion regarding public affairs.[168] If a law, or in the instant case, the "truth plus motive" defense unreasonably or unnecessarily restrict the flow of information to the public, it should be declared unconstitutional as an infringement on the self-governing process.[169] The "truth plus motive" defense, such as Nebraska's, un-

160. *See* notes 161-67.
161. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
162. *Id.* at 359.
163. New York Times Co. v. Sullivan, 376 U.S. 254, 273, 275 (1964); Alexander Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1969).
164. Garrison v. Louisiana, 379 U.S. 64, at 73 (1964).
165. *Id.*
166. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964)(quoting N.A.A.C.P. v. Button, 371 U.S. 415, 445 (1963)).
167. *Id.*
168. This balancing test is suggested in Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
169. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Garrison v. Louisiana, 379 U.S. 64, 70-73 (1964).

reasonably restricts the type and amount of information the public receives and causes the press to censor themselves out of fear of expensive libel actions. Thus, Nebraska's defense of "truth plus motive" should be declared unconstitutional.

V. THE "TRUTH PLUS MOTIVE DEFENSE" IN OTHER JURISDICTIONS

After the *Croswell* definition[170] of the "truth plus motive" defense was included in the New York Constitution[171], several states over the years, including Nebraska incorporated wording similar to Hamilton's into their statutes or constitution. These statutes remained unchallenged until the *New York Times* and *Garrison* decisions presented libel defendants with Supreme Court precedent with which to attack the constitutionality of the defense. Several states have adapted their defamation laws to the *New York Times* standards. In fact the three states—Massachusetts, Maine, and Florida—that the Nebraska Supreme Court cited as influential precedent in *Wertz*, have all since followed the Supreme Court's lead and limited or overruled the "truth plus motive" defense.

The Appeals Court of Massachusetts limited the use of common law malice and the "truth plus motive" defense in *Milhalik v Duprey*.[172] The court stated "the meaning of 'actual malice' as used in that section plainly cannot be continued with respect to public officers and public figures."[173] Massachusetts courts prior to *Milhalik* defined actual malice in the common law sense as the absence of good will or justifiable ends.[174] Massachusetts courts recognized the opportunity the Supreme Court left open in *Gertz* to formulate a different standard for private individual defamation cases outside the scope of First Amendment protection. The court's statement in *Milhalik* that "with respect to public officers and public figures" the "truth plus motive" defense could not be continued in "view of the *New York Times* case," seems to indicate the motive underlying the defense will still be permissible in private individual defamation cases in Massachusetts.[175]

Maine courts have taken a similar approach by requiring a public official to meet the requirements of the *New York Times* test. In

170. *See* notes 84-86 and accompanying text.
171. N.Y. CONST. art. VII, § 8 (1821).
172. 417 N.E.2d 1238 (Mass. App. Ct. 1981). The Massachusetts statute, similar to Nebraska's, provides, "The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved." MASS. GEN. LAWS ANN. ch. 231, § 92 (West 1991).
173. Milhalik v. Duprey, 417 N.E.2d 1238, 1242 (Mass. App. Ct. 1981).
174. Conroy v. Fall River Herald News Co., 28 N.E.2d 729 (Mass. 1940).
175. Milhalik v. Duprey, 417 N.E.2d 1238, 1242 (Mass. App. Ct. 1981).

Michaud v. Inhabitants of the Town of Livermore the court stated, "*New York Times* teaches us that Michaud [the plaintiff], as a public official, must in order to make out his claim of actionable defamation prove, not only that the defamatory statements . . . were in fact false, but that also, [the defendants] made the statements with knowledge that they were false."[176] The court continued to distinguish constitutional malice from common law malice stating:

> 'actual malice' is so used, however, in a specialized, rather than a literal sense; it refers to the publisher's knowledge or reckless disregard of falsity. The term 'actual malice,' so used as shorthand for 'knowledge or reckless disregard,' is to be distinguished from malice in the sense of ill-will or animosity. Animosity or even a desire to injure the other party does not alone constitute the 'actual malice' that takes the statement outside the First Amendment protections.[177]

Maine case law indicates that the "truth plus motive" defense may be applicable in private individual defamation cases just as Massachusetts does.[178] Additionally, the *Michaud* language seems to indicate that common law malice may be probative of constitutional malice.

Florida courts have limited the application of the "truth plus motive" defense and made the distinction between constitutional malice and common law malice quite clear through *In re Standard Jury Instructions*.[179] Approving a recommended jury instruction for use in a defamation case, the court applied the *New York Times* standard in cases involving public officials or public figure claimants.[180] In cases involving private claimants and non-media defendants the court approved an instruction detailing the "truth plus motive" defense adopting common law malice in these situations.[181] By allowing the "truth plus motive" defense in private individual cases and not in public figure cases, the Florida jury instructions highlight the public figure/private individual distinction the Supreme Court suggested in *Gertz*.[182]

Nebraska courts have not directly applied the public figure/private individual distinction to the "truth plus motive" defense in a decision to date. However, the facts of several cases discussed herein and the standards applied in them indicate that the Nebraska Supreme Court

176. 381 A.2d 1110, 1113 (Me. 1978).
177. *Id. See also* Tucci v. Guy Gannet Publishing Co., 464 A.2d 161, 165-66 (Me. 1983).
178. *See* Tucci v. Guy Gannet Publishing Co., 464 A.2d 161 (Me. 1983).
179. 575 So.2d 194 (Fla. 1991).
180. The approved instruction provided "[y]ou must next determine whether clear and convincing evidence shows that at the statement was made (defendant) knew the statement was false or had serious doubts as to its truth." *Id.* at 196.
181. Under the heading "Defense issues of truth and good motives" the approved instruction states "[o]n the [first] defense, the issue for your determination is whether statement made by the (defendant) was substantially true and was made by (defendant) with good motives." *Id.* at 197. *See also* Della Donna v. Gore Newspaper Co., 489 So.2d 72 (Fla. 1986)(application of the *New York Times* standards to a public figure case).
182. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

may make such a distinction and limit the application of the "truth plus motive" defense to private individual cases. In *Deaver*, the plaintiff, a former county sheriff, would likely be considered a public figure under the current United States Supreme Court tests. The court analyzed the case under the constitutional malice standards prefacing its opinion with "[t]he issue not squarely before us, we do not decide the effect, if any, of this statute [25-840] on public official libel lawsuits."[183] The court's utilization of the constitutional malice standards in this public official case may indicate that the "truth plus motive" defense will not apply to public official cases. One case, however, is not a reliable indicator on the court's future response.

The Nebraska Supreme Court recognized the "truth plus motive" defense in *McCune v. Neitzel*, a private individual case.[184] The defendant in *McCune* spread the rumor that the defendant had contracted the HIV virus. The court did not discuss the "truth plus motive" defense because the defendant did not plead it as an affirmative defense; however, the court did indicate that had the defense been affirmatively pled the hate, spite or ill-will definition of malice would have been used.[185] Additionally, the court utilized the "truth plus motive" defense in *Turner v. Welliver*, another private individual defamation case.[186] These cases may indicate that common law malice and the

183. Deaver v. Hinel, 223 Neb. 529, 532, 391 N.W.2d 128, 131 (1986). *See also* Hoch v. Prokop, 244 Neb. 443, 507 N.W.2d 626 (1993). In *Hoch*, the Nebraska Supreme Court supplied another indication that it will apply constitutional malice standards in public figure defamation cases. The plaintiff in *Hoch* was running for a position on the University of Nebraska Board of Regents. Her opponent in the race published and distributed a flier criticizing the plaintiff's previous record as a regent. *Id.* at 628. The plaintiff brought suit alleging thirteen separate instances of libel arising from the flier. The district court granted the defendant's summary judgment motion on twelve of the thirteen counts, allowing the thirteenth to go to trial. The Nebraska Supreme Court held that the district court committed plain error in not in its failure to recognize that the plaintiff's petition did not state a cause of action. *Id.*

The court unequivocally indicated that the plaintiff, a candidate for public office, was a public figure under current Supreme Court tests. *Id.* at 629. The court then applied constitutional defamation standards to the situation, defining actual malice as, "knowledge of falsity or reckless disregard for the truth." *Id.* Furthermore, the court indicated that it was necessary for the plaintiff to plead falsity in order to establish a prima facie case of libel, and the plaintiff must also demonstrate the falsity of the allegedly defamatory statements in order to be successful on the merits. *Id.* The *Hoch* decision supports the contention that in public figure cases the Nebraska Supreme Court will apply constitutional standards. However, *Hoch* does not indicate that the "truth plus motive" defense is a dead letter in Nebraska. The court did not address the Nebraska statutes or case law regarding the defense; therefore, at least the defendant in a private figure defamation case still must be aware of the ramifications of his motives in making an allegedly defamatory statement.

184. 235 Neb. 754, 457 N.W.2d 803 (1990).

185. *Id.* at 810.

186. 226 Neb. 275, 290, 411 N.W.2d 298, 309 (1987).

"truth plus motive" defense may have a place in private figure defamation cases, but the absence of a definitive statement by the Nebraska Supreme Court leaves the media publisher or broadcaster to speculate as to which standard will be applied. A general trend of application would provide more guidance. However, the paucity of decisions handed down on this subject do not allow for accurate or at least comfortable predictions.

Several other states have provided firmer direction for libel plaintiffs and defendants. These states have determined that common law malice as embodied in the "truth plus motive" defense is still a useful indicator of a publisher's attitude toward the truth or falsity of the publication[187] or in the determination of whether to award punitive damages.[188] However, these same courts have indicated that the ill-will or a lack of good motives alone cannot defeat the defense of truth. One court stated:

> It is settled that ill will toward the plaintiff or bad motives are not elements of actual malice and that such evidence is insufficient by itself to support a finding of actual malice. . . . [E]vidence of ill will or bad motives will support a finding of actual malice only when combined with other, more substantial evidence of a defendant's bad faith.[189]

Not only is Nebraska's continued use of the "truth plus motive" defense contrary to the general trend of other state courts, it also contrary to the defamation reform efforts of the legal community.[190]

187. *See supra* note 29.

188. *See supra* notes 33-36.

189. Herron v. King Broadcasting Co., 746 P.2d 295, 309 (Wash. 1982). *See also* Batson v. Shiflett, 602 A.2d 1191, 1213 (Md. 1992); Rose v. Koch, 154 N.W.2d 409, 428 (Minn. 1967); Perez v. Scripps Howard Company, 520 N.E.2d 198, 202-03 (Ohio 1988); Fitzpatrick v. Philadelphia Newspapers, Inc., 567 A.2d 684 (Pa. Super. Ct. 1989)(stating "[f]ailure to investigate without more, will not support a finding of actual malice, nor will ill will or a desire to increase profits." *Id.* at 688); Hackworth v. Larson, 165 N.W.2d 705 (S.D. 1969); Polzin v. Helmbrecht, 196 N.W.2d 685, 691 (Wis. 1972)("Here, then, where there was a finding only of 'express malice,' the verdict does not constitutionally support a finding of 'actual malice' and for that reason the verdict does not meet *New York Times* in that regard." *Id.*)

190. The National Conferee of Commissioners on Uniform State Laws assigned a drafting committee to review the proposed Uniform Defamation Act of 1989. Drafts were submitted to the ULC at the 1990 and 1991 meetings. The current draft discussed in this Note is not the final draft. It was presented for a final reading in August of 1993. Nonetheless, the current draft represents the policy choices of the committee and the structure of the proposed act. Robert J. Hawley, *An Overview of the Uniform Defamation Act*, 338 PLI/PAT 645 (1992). The Annenberg Washington Program of Northwestern University, a non-profit organization committed to assessing how communications technologies and current public policies on communications affect aspects of American life, also prepared a proposed Model Libel Reform Act. The philosophy behind the Act is "the conviction that the law of defamation and the First Amendment should not work at cross-purposes, but should function in harmony to serve the compelling public interest in the pursuit of the truth." *Id.* app. A at 683-709, *The Report of the Libel Reform Project of the Annenberg Washington Foundation.*

These reform movements focus on the "proper balance between constitutionally protected guarantees of free expression and the need to protect citizens from reputational harm."[191] Both major reform proposals, the Annenberg Washington Program and the National Conference of Commissioners on Uniform State Laws, reject the use of common law malice as a standard of liability.[192]

The elements of a defamation action as outlined in each proposal require the statement to be false in order to be actionable.[193] Both proposals make no provision for the "truth plus motive" defense in any form. Section 18 of the ULC's proposed act entitled "Conditional Privilege for Statement's Concerning Public Officials and Public Figures" recognizes the constitutional malice standard. The section provides,

> A person may not be held liable for damages based on a statement about a public official or a public figure unless the plaintiff proves the statement was:
> (1) unrelated to the person's status as a public official or public figure; or
> (2) made with knowledge of its falsity or reckless disregard for its truth.[194]

The comment following this section indicates that the privilege can be overcome "only upon a showing of actual malice" not upon a showing of ill-will or improper motives.[195] The Annenberg proposal is more specific in its exclusion of the "truth plus motive' defense when it states:

> Current law recognizes a wide variety of circumstances in which a conditional privilege would be deemed abused and forfeited, including . . . ill will or spite. . . . This Act, however, recognizes only two grounds for defeating a conditional privilege: excessive publication and publication with knowledge of falsity or reckless disregard for truth or falsity.[196]

The Annenberg proposal rejects common law malice and recognizes that "[a] communication motivated by spite may nonetheless serve the purpose advanced by the privilege. . . . A tainted motive does not of itself reduces the social value of the communication."[197]

Neither of these proposals have been adopted. In fact the ULC proposal has not been completed. However, they do indicate a trend in legal thinking that will be influential in future defamation law developments. Nebraska courts should recognize the well developed trends demonstrated in the case law of other jurisdiction's as well as the developing reformation of libel law evidenced by the Annenberg and ULC proposals. This recognition should be followed by a revision of

191. *Id.* at 657.
192. *Id.* at 658.
193. *Id.* at 661, 669. The Annenberg proposal states that all defamation actions must be based "false defamatory statements of fact."
194. *Id.* at 669.
195. The actual malice refereed to throughout the proposed Act is constitutional malice as defined in *New York Times*. *Id.*
196. *Id.* at 674.
197. *Id.* at 673.

Nebraska defamation law by the courts in order to bring Nebraska's law within the national standards and comply with the Supreme Court rulings beginning with *New York Times*.

VI. CONCLUSION

The great weight of authority is opposed to Nebraska's "truth plus motive" defense. The United States Supreme Court, beginning with *New York Times*, has consistently indicated that truthful statements may not be the basis for a defamation action. Grounding its decision on the constitutional principles of free speech and uninhibited public debate, the Court in *Garrison* overruled the "truth plus motive" defense as an unconstitutional restraint of free speech.[198] The decisions following *Garrison* solidified the Court's denunciation of a "truth plus motive" defense, sending an unequivocal message that truthful statements were to receive absolute protection.[199]

If the weight of several Supreme Court decisions is not sufficient to compel the Nebraska courts to overturn the "truth plus motive" defense, the policy arguments supporting an absolute defense of truth in public figure cases should move the courts to reconsider the propriety of maintaining the defense. The inhibition and self-censorship caused by the "truth plus motive" defense reduce the flow of information to the public, denying the people information necessary to the governing process. The free flow of information has long been recognized as vital to the effective functioning of a democratic form of government, and any barrier, statutory or judicial, that serves no reasonable public safety regulatory function, should be removed as an infringement on the process of self-government.

The weight of several United States Supreme Court decisions, the compelling policy reasons supporting the repeal, the strong positions taken by other states, and the developing trends in defamation law all mitigate in favor of Nebraska abolishing the "truth plus motive" defense. It appears that the weight of authority would be on the side of defamation defendant challenging the court's interpretation of actual malice and the "truth plus motive" defense. The resolution of the issue only awaits the proper jurisdictional situation and adversaries.

198. Garrison v. Louisiana, 378 U.S. 64, 74-76 (1964).
199. *See supra* notes 49-65 and accompanying text.